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In the Supreme Court of the United States

OCTOBER TERM, 1960

ALEX H. WASHBURN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The findings of fact and opinion of the Tax Court (Pet. a-1—a-7) are reported at 33 T.C. 1003. The opinion of the Court of Appeals (Pet. a-9—a-17) is reported at 283 F. 2d 839.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1960. (Pet. a-19.) The petition for a writ of certiorari was filed on January 31, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether expenditures made by the taxpayer in securing signatures for the purpose of referring an

Act of the Arkansas legislature to popular vote were deductible either as ordinary and necessary expenses in carrying on any trade or business under Section 162(a) of the Internal Revenue Code of 1954 or as ordinary and necessary nonbusiness expenses under Section 212 (1) and (2) of the Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set out in the Appendix, *infra,* pp. 8–10.

STATEMENT

During the year 1955, the taxpayer was the publisher and editor of the Hope Star, a newspaper published at Hope, Arkansas, and owned by Star Publishing Company, an Arkansas corporation. The taxpayer owned 50% of the capital stock of the Star Publishing Company, and was its only salaried officer. (Pet. a–2.)

In 1955, the Arkansas Legislature passed an Act which exempted livestock and poultry feeds from the then existing 2% state sales tax. During the same year, the taxpayer expended the following amounts in securing the required number of signatures for the purpose of referring this exemption Act to the people for a popular vote at the November 1955 general election (Pet. a–2—a–3):

Direct canvassing expense	$3,266.42
Hotels—canvassing	223.10
Postage, printing, express	558.18
Telephone	444.35
Legal services	1,500.00
Expenses reimbursed to attorneys	32.91
	$6,024.96

The taxpayer felt that, if the exemption of livestock and poultry feeds from the 2% sales tax should continue, an increase in the general sales tax rate would ultimately result; that such an increase in sales tax in Arkansas would cause many purchasers to go to Texarkana, a neighboring town in Texas which had no sales tax, thus reducing business in Hope; that such loss of business by the merchants of Hope would cause a reduction in the advertising income of the Star Publishing Company and so in the personal income of the taxpayer. The sales tax rate in Arkansas was later increased to 3%. (Pet. a–3.)

The taxpayer claimed the total amount of $6,024.96 as a deduction on his individual income tax return for the year 1955. The Commissioner disallowed the deduction. (Pet. a–3.)

The Tax Court found that the purpose of the $6,024.96 expenditure made by the taxpayer in 1955 was to render null and void the legislative Act, passed in 1955, granting sales tax exemption to livestock and poultry feeds, and that, since such expenditure was made for the promotion or defeat of legislation, it was not deductible as ordinary and necessary to the carrying on of the taxpayer's trade or business, or for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income. (Pet. a–3—a–4.) The Tax Court also held that the possible benefit to the taxpayer that might have resulted from the defeat of such legislation was too remote and uncertain to justify the deduction. (Pet. a–6—a–7.)

The Court of Appeals affirmed the decision of the Tax Court. (Pet. a–9—a–17.)

ARGUMENT

The decision below represents a direct application of the principles enunciated by this Court in *Cammarano* v. *United States*, 358 U.S. 498, and *Textile Mills Corp.* v. *Commissioner*, 314 U.S. 326; there is no conflict in the circuits; and there is no other basis for review by this Court.

1. On the authority of *Cammarano* v. *United States, supra*, in which this Court held that amounts spent for the promotion or defeat of legislation, including initiatives and referenda, are not deductible as "ordinary and necessary" business expenses, the Tax Court correctly disallowed the claimed deduction in the present case under both Sections 162 and 212 of the Internal Revenue Code of 1954, Appendix, *infra*, p. 8. The pertinent regulation in force in 1955 (Treasury Regulations 118, Section 39.23(o)–1(f), Appendix, *infra*, p. 9), which prohibited "[s]ums of money expended for * * * the promotion or defeat of legislation * * *" to be "deductible from gross income * * *," similarly substantiated the Tax Court's position.[1]

In an attempt to avoid the holding in *Cammarano* and the express language of the pertinent regulation,

[1] The regulation was applicable to both Sections 162 and 212, pending adoption of the Regulations under the 1954 Code. (See Pet. a–13—a–14.) Section 1.162–15(c)(1) of the Treasury Regulations on Income Tax (1954 Code), Appendix, *infra*, pp. 9–10, which contained similar, but more detailed, prohibitions as to deductibility, was subsequently adopted. (See Pet. a–5, fn. **.)

the taxpayer argues (Pet. 4–5) that, in making expenditures to obtain the necessary number of signatures to have the Act placed on the ballot for referendum, he was not taking a position on the merits of the Act, and that therefore the amounts were not spent for the promotion or defeat of legislation but only to secure signatures on a petition. Even if this attempted distinction had any validity whatever in theory, it would merely raise a simple issue of fact concerning the taxpayer's purpose, as to which the Tax Court's findings would not be clearly erroneous. Cf. *Commissioner* v. *Heininger*, 320 U.S. 467, 475; *Revere Racing Assn.* v. *Scanlon*, 232 F. 2d 816 (C.A. 1st). Moreover, in the absence of a referendum, the statute exempting livestock and poultry feed from the sales tax would have remained on the books. Therefore, as the Court of Appeals said (Pet. a–16), and the Tax Court found (Pet. a–3), the taxpayer obviously was expending these funds for the purpose of annulling the existing legislation.

The fact that the taxpayer was acting under the referendum authority of Amendment 7 to the Arkansas Constitution has no bearing on the deductibility of the expenditures. In *F. Strauss & Son, Inc.* v. *Commissioner*, 251 F. 2d 724 (C.A. 8th), affirmed *sub nom. Cammarano* v. *United States*, *supra*, in which the expenditures had been made to oppose an initiative originated under the same provision of the Arkansas Constitution, this Court refused to draw a distinction between initiatives or referenda and other types of legislation.

2. As an alternative ground for disallowance of the deductions under Sections 212 (1) and (2) of the 1954 Code, both courts below found that the benefit to the taxpayer to be realized from the defeat of the legislation was too remote and uncertain. In order that expenses be deductible under Section 212, they "must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income" (Treasury Regulations 118, Section 39.23(a)-15(c), Appendix, *infra*, pp. 8-9),[2] and, as this Court pointed out in *Trust of Bingham* v. *Commissioner*, 325 U.S. 365, 370, "questions of reasonableness and proximity are for the trier of fact, here the Tax Court."[3] In the present case, as the courts below correctly noted (Pet. a-6—a-7, a-17), the expenditures made by the taxpayer to annul the sales tax exemptions—in order to avoid the enactment of a higher sales tax which might divert business from the town of Hope and thus possibly result in less revenue for his newspaper and conceivably in less dividends to the taxpayer—were obviously too remote and uncertain from the intended

[2] Section 1.212-1(d) of the Treasury Regulations on Income Tax (1954 Code), Appendix, *infra*, p. 10, which was issued subsequent to the taxable year here involved (see footnote 1, *supra*), contains the same language as the 1939 regulation.

[3] A comparable rule of law would apply to expenses which must be "directly connected with or pertaining to the taxpayer's trade or business" (Treasury Regulations 118, Section 39.23(a)-1, Appendix, *infra*, p. 8; Treasury Regulations on Income Tax (1954 Code) Section 1.162-1(a), Appendix, *infra*, p. 9), if they are to be deductible as "ordinary and necessary" business expenses under Section 162 of the 1954 Code.

benefit to be allowable under Section 212 of the 1954 Code.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Petitioner's reliance (Pet. 5) on *Welch* v. *Helvering*, 290 U.S. 111, is misplaced, for there this Court affirmed a Tax Court holding that the taxpayer failed to carry his burden of proving his expenditures to be ordinary and necessary business expenses rather than capital outlays. There was no question of proximate relationship between the expenditures and the objective to be gained, as there was in the present case.

APPENDIX.

Internal Revenue Code of 1954:

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.

* * * * * *

(26 U.S.C. 162.)

SEC. 212. EXPENSES FOR PRODUCTION OF INCOME.

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income; or

(3) in connection with the determination, collection, or refund of any tax.

(26 U.S.C. 212.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

SEC. 39.23(a)-1 *Business expenses.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than subsection (a) of section 23. * * *

* * * * * *

Sec. 39.23(a)-15 *Nontrade or nonbusiness expenses.* * * *

* * * * * *

(c) Expenses, to be deductible under section 23(a)(2), must be "ordinary and necessary," which presupposes that they must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income.

* * * * *

SEC. 39.23(o)-1 *Contributions or gifts by individuals.* * * *

* * * * *

(f) Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

* * * * *

Treasury Regulations on Income Tax (1954 Code):

SEC. 1.162-1 *Business Expenses.*—(a) *In general.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than section 162 * * *.

* * * * *

SEC. 1.162-15 [As amended by T.D. 6435, 1960-4 Int. Rev. Bull. 7] *Excepted Contributions.*—* * *

* * * * *

(c)(1) Expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) related to any of the

foregoing purposes are not deductible from gross income. * * *

* * * * * *

SEC. 1.212–1 *Nontrade or Nonbusiness Expenses.*— * * *

* * * * * *

(d) Expenses, to be deductible under section 212, must be "ordinary and necessary". Thus, such expenses must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income.

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